IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARCOS PENA	:	CIVIL ACTION
v.	:	
LEHIGH COUNTY, et al.	:	NO. 00-1646

O'NEILL, J. JANUARY , 2001

MEMORANDUM

Plaintiff Marcos Pena, an inmate at SRCF-Mercer, has brought this pro se action under 42 U.S.C. § 1983 against Lehigh County and its District Attorney alleging violations of his civil rights under the Fourteenth Amendment of the Constitution. Pena seeks the return of money seized from his apartment following his arrest in March, 1994, as well as declaratory relief and an award of punitive damages. Presently before me is defendants' motion for summary judgment and plaintiff's response thereto, as well as plaintiff's motion to compel discovery of certain documents.

I. BACKGROUND

Pena was arrested on March 4, 1994 for a number of controlled substance violations. Following his arrest, plaintiff consented to a search of his apartment wherein $22,511 dollars were seized by the police. He was released on bail pending his prosecution. Defendants sent notice by certified mail to Pena at his last known address on March 30, 1994 informing him that the money seized during the arrest was to be the subject of a forfeiture proceeding to take place

on May 18, 1994, pursuant to 42 Pa. Cons. Stat. § 6801. When this notice was returned as undeliverable defendants published the notice of forfeiture in The Morning Call, a newspaper of general circulation, on one day of each of two successive weeks. Pena did not participate in the hearing on May 18, 1994 and the entire amount was forfeited. Pena did not appeal this order. On August 26, 1996 Pena pled guilty to a drug related offense and was incarcerated. Seeking the return of the money seized during his arrest Pena filed a motion for return of property pursuant to Pennsylvania Rule of Criminal Procedure 324 on October 6, 1998. Relying on the 1994 order of forfeiture, this motion was denied following a hearing before the Lehigh County Court of Common Pleas on January 21, 1999.

The crux of Pena's claim is that defendants failed to notify him properly of the 1994 forfeiture proceeding. At the time of the forfeiture Pena asserts that he spoke little English and that a single attempt at service by certified mail followed by publication in an English-language newspaper was not sufficient to notify him of the proceeding. Pena maintains that he first became aware that the money had been forfeited in January 1999 when his motion for return of property was denied. He then requested all transcripts and records relating to the 1994 forfeiture proceeding. On May 6, 1999 the Lehigh County Court of Common Pleas denied this request. On April 11, 2000 the Commonwealth Court of Pennsylvania affirmed this decision. On May 10, 2000 plaintiff commenced this action claiming that defendants failed to provide him with adequate notice of forfeiture and that defendants' refusal to provide plaintiff with any notice, order, or transcripts of the forfeiture proceedings thereafter was "a deliberate act of obstructing appellate review of [d]efendant's denial of [p]laintiff's Motion for Return of Property." (Pl.'s Comp. at 4). Pena labels defendants' actions as a "[d]eliberate indifference to statutory

procedures" and a "failure to properly train and supervise their agents" in violation of his due process rights under the Fourteenth Amendment. Id. at 4-5. Defendants move for summary judgment on the basis that plaintiff's action is barred by the applicable statute of limitations. Should I determine that plaintiff's suit may proceed defendants move for summary judgment on the grounds that the notice that was given satisfied constitutional requirements. Lastly defendants maintain they have not obstructed any of Pena's legal rights. Plaintiff has moved to compel defendants to disclose certain documents related to the 1994 forfeiture procedure.

II. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). My task is not to resolve disputed issues of fact, but to determine whether there exist any factual issues to be tried. See Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party. See Andersen, 477 U.S. at 248. However, the non-moving party must raise "more than a mere scintilla of evidence in its favor" and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions in order to overcome a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). Further, where the nonmoving party bears the burden

of persuasion at trial, the moving party may meet its initial burden and shift the burden of production to the nonmoving party "by 'showing' -- that is, pointing out to the district court- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Thus, summary judgment will be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

As noted above, Pena is proceeding pro se and therefore I will construe his complaint liberally. See Lewis v. Attorney Gen. of the United States, 878 F.2d 714, 722 (3d Cir.1989). To this end I will treat his complaint as an affidavit for purposes of determining defendants' summary judgment motion. See Reese v. Sparks, 760 F.2d 64, 67 n.3 (3d Cir.1985) (treating verified complaint of a prisoner acting pro se as an affidavit).

III. DISCUSSION

A. Statute of Limitations

Because Congress has not provided a statute of limitations for civil rights actions brought under 42 U.S.C. § 1983, federal courts adopt the forum state's general personal injury limitations period. See Owens v. Okure, 488 U.S. 235, 249-50 (1989). Since Pennsylvania's statute of limitations for personal injury is two years, see 42 Pa. Cons. Stat. § 5524 (2000), Pena's claims are subject to a two-year statute of limitations. Defendants maintain that since Pena "waited approximately six years to commence the action. . . his claim should be dismissed." However, the statute of limitations for section 1983 cases "begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis. . . of the action." Genty v.

Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). The injury alleged by plaintiff is the loss of the money seized during his arrest. Pena's claim revolves around his allegation that he was not aware of the forfeiture proceeding, and thus the loss of the money, until after his motion for return of property was denied on January 21, 1999. As plaintiff filed this suit less than two years later on May 10, 2000 defendants' motion for summary judgment on statute of limitations grounds will be denied.

B. Adequacy of Notice

Pena alleges that he did not receive notice of the Commonwealth's initiation of forfeiture proceedings. The first issue before me is whether this failure was due to defendants' violation of 42 Pa. Cons. Stat. § 6802 (2000), the statute governing forfeiture notification. Should I find that defendants adhered to section 6802, then I must determine if the statute itself satisfies the due process requirements of the Fourteenth Amendment.

1. Notice of forfeiture requirements under Pennsylvania law

Defendants maintain that the methods used to notify Pena of the forfeiture proceedings were adequate under 42 Pa. Cons. Stat. § 6802(b), (c).[1] Defendants sent Pena notification on

[1] (b) "Notice to property owners -- A copy of the petition shall be served personally or by certified mail on the owner or upon the person. . . in possession at the time of the seizure.

(c) Substitute notice -- If the owner or person. . . in possession at the time of the service cannot be personally served or located within the jurisdiction of the court, notice of the petition shall be given by the Commonwealth through an advertisement in only one newspaper of general circulation published in the county where the property shall have been seized, once a week for two successive weeks. No other advertisement shall be necessary, any other law notwithstanding." Controlled Substance Forfeitures, 42 Pa. Cons. Stat. § 6802(b), (c) (2000).

March 30, 1994 by certified mail to his last known address. The notice was returned unopened labeled undeliverable. Defendants then published the notification on April 8 and April 15, 1994 in the Morning Call an English-language newspaper of general circulation. Pena does not dispute these facts but argues that these measures were not sufficient to provide him with notice of the forfeiture proceeding. In support of this position Pena cites Pennsylvania Rule of Civil Procedure 403, governing service of process by mail when initiating a civil claim in Pennsylvania state court. However, 42 Pa. Cons. Stat. §§ 6801, 6802 create a special form of civil proceeding specifically for the disposal of property seized in connection with enforcing the Commonwealth's drug laws. Contained within this scheme are specific provisions governing notification, one of which states service may be made by certified mail and another of which allows for notice by publication in the event the person in possession of the property at the time of the seizure cannot be served or located. See 42 Pa. Cons. Stat. § 6802, infra n.1. As defendants are not governed by Pa. R. Civ. R. 403 plaintiff may not rely on it to overcome defendants' motion for summary judgment.

Pena also claims that defendants "deliberately misled this Court" in claiming to have to have followed the procedures prescribed by section 6802. In support of this assertion plaintiff states that the "defendants did surreptitiously attempt once, and once only, to serve [Pena] by certified mail." (Pl. Obj. Mot. for S.J.). Pena further accuses defendants of not attempting to serve him personally, stating that this could have been done easily as his own lawyer never had any problem contacting him and he had given his correct address at the time he was released on bail as 2 Maryland Circle, Apt. #128, Whitehall PA, 18052. Id. Plaintiff also contends that "[i]t is suspect" that he was served with a bench warrant less than one month after the forfeiture

proceeding "without a problem." Id. Pena's own account shows that defendants attempted to serve him by certified mail. Further, the address on the certified mail envelope used by defendants was 2 Maryland Circle, Apt. #128, Whitehall PA, 18052, the address Pena asserts he had listed when he was released on bail following his arrest on March 4, 1994. See Martin Aff. Ex. C. Section 6802 (b) specifically allows for service by certified mail and gives no indication that either personal service or multiple attempts must be made in notifying possessors or owners of seized property that a forfeiture proceeding has been scheduled.

Plaintiff also claims that defendants' subsequent publication of the notice in The Morning Call was insufficient because "[t]he plaintiff was not competent to read and understand the english [sic] language at that time." (Pl. Obj. Mot. for S.J.). I will address whether or not English-language notice to those who cannot speak English violates the due process clause of the Fourteenth Amendment in the following section. I note, however, that defendants' publication of the notice in The Morning Call on one day of each of two successive weeks complies with section 6802(c) of the forfeiture statute, which further states that "[n]o other advertisement of any sort shall be necessary, any other law to the contrary notwithstanding." See 42 Pa. Cons. Stat. § 6802(c), infra n.1. I find that there are no issues of material fact as to whether defendants complied with the statutory requirements for notifying Pena of the forfeiture proceeding held on May 18, 1994.

2. Language Requirement

Plaintiff claims that following the failure of service by certified mail defendants' subsequent publication of the notice in The Morning Call was insufficient because "[t]he plaintiff

was not competent to read and understand the english [sic] language at that time." (Pl. Obj. Mot. for S.J.). In Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994), the Court of Appeals for the Second Circuit applied Soberal-Perez v. Heckler, 717 F. 2d. 36 (2d Cir. 1983), to hold that a plaintiff whose primary language was French had received adequate notice of a forfeiture proceeding provided to her in English. In Soberal the court had held that "[n]otice in the English language to social security claimants residing in the United States is 'reasonably calculated' to apprise individuals of the proceedings," and

> while the fundamental tenets of due process require adequate notice to ensure that all parties have a meaningful opportunity to be heard due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, it calls for procedures fitted to the circumstances of particular situations. The basic standard to be applied is one of reasonableness.

Soberal-Perez, 717 F.2d at 43 (citations omitted). In determining whether the challenged notice was reasonable the Soberal court concluded that "[a] rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with notice in English does not violate any principle of due process." Id. While it is true that the plaintiffs in Toure and Soberal actually received a notice of some kind and Pena did not, I find the steps taken by defendants reasonable under the circumstances. The Toure court found a notice sent in English to a non-English speaker did not violate due process even where the plaintiff was incarcerated thereby limiting his access to translators, and held that "[a] requirement that the government ascertain, and provide notice in the 'preferred' language of prison inmates or detainees would impose a patently unreasonable burden upon the government. . . ." 444 F.3d at 446. I find that requiring the notice giver to determine the preferred language of each person in possession of property at the time of seizure so that notification of the forfeiture proceeding can

be published in that language also is unreasonable.

However, publishing the notice in the Morning Call may be constitutionally inadequate if defendants knew or had reason to know at the time the notice was sent that it would be ineffective. See Robinson v. Hanrahan, 409 U.S. 38, 40 (1972) (notice of forfeiture was ineffective where the state knew property owner was incarcerated and could not get to the address where the notice was sent); Covey v. Town of Somers, 351 U.S. 141 (1956) (notice of foreclosure was inadequate where town officials were aware the individual was incompetent and in the care of a guardian); United States v. McGlory, 202 F.3d 664, 672 (3d Cir. 2000) (holding that notice of forfeiture proceeding sent to the Marshall's Service or to a prisoner's last known address is inadequate where the government knows or may quickly obtain the place where the prisoner is confined); United States v. Woodall, 12 F.3d 791 (8th Cir. 1993) (case remanded where movant alleged notice of forfeiture was mailed to the wrong address and the government was aware of the correct address). Pena cites Covey for the proposition that notice was inadequate since defendants knew that he would not be able to understand any notice sent to him in English. However, Pena merely asserts that at the time the notice was sent and published he spoke very little English, and makes no showing that defendants had any knowledge of this fact.[2] As the non-moving party Pena must raise "more than a mere scintilla of evidence in [his] favor" in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. Williams v. Borough of W. Chester, 891

[2] The second paragraph on the first page of plaintiff's memorandum in support of his objection to defendants' motion for summary judgment states, "[p]laintiff, a Hispanic male that spoke little English and enjoyed an appointed translator for said proceedings, was never served with notice of forfeiture for the seized property." However, this statement is not evidence that defendants knew that Pena could not read a notice written in English.

F.2d 458, 460 (3d Cir. 1989)

3. Constitutionality of 42 Pa. Cons. Stat. § 6802

In general, when "the government seeks the traditionally disfavored remedy of forfeiture, due process protections ought to be diligently enforced and by no means relaxed." Armendariz-Mata v. U.S. Dept. of Justice, 82 F.3d 679, 683 (5th Cir. 1996). In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), the Supreme Court established that proper notice is included among those protections stating, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Under section 6802 notice of an impending forfeiture proceeding may be "served personally or by certified mail. . . ." See 42 Pa. Cons. Stat. § 6802, infra n.1. Accepting plaintiff's allegation that no attempt was made to serve him personally and that he never received notice of the forfeiture proceeding, Pena still has not demonstrated that section 6802 falls below the standard established in Mullane. "The proper inquiry is whether the state acted reasonably in selecting means likely to inform persons effected, not whether each property owner actually received notice." Weigner v. City of New York, 852 F.2d 646, 649 (2d Cir 1988). Due process does not require that a forfeiture claimant actually receive timely notice of an impending forfeiture. See Pou v. United States Drug Enforcement Admin., 923 F. Supp. 573, 578 (S.D.N.Y. 1996). The notice procedures established in section 6802 are reasonably calculated to apprise property owners or those in possession of property at the time of seizure of the pendency of forfeiture proceedings.

C. Deliberate Indifference/ Failure to Train

Citing City of Canton v. Harris, 489 U.S. 378 (1989), Pena accuses defendants of deliberate indifference to his constitutional rights and a conscious failure to train their officers to comply with proper constitutional procedures. Interpreting City of Canton v. Harris, the Court of Appeals reasoned "that only when a municipality's failure to train is tainted by deliberate indifference to constitutional rights can that failure rise to the level of a municipal policy or custom" that is actionable under section 1983. Simmons v. City of Philadelphia, 947 F.2d 1042, 1060 (3d Cir. 1991). Such a policy or custom exists only where there is "a deliberate choice to follow a course of action. . . made from among various alternatives by city policy makers. City of Canton 489 U.S. at 389. Therefore "a plaintiff, in order to meet the deliberate indifference standard for directly subjecting a [local government] to section 1983 liability, must present scienter-like evidence of indifference on the part of a particular policymaker or policymakers." Simmons, 947 F.2d at 1060.

1. Procedures for Processing Forfeiture

Plaintiff maintains that he originally was led to believe that the money seized during his arrest would be returned to him as part of his plea agreement and therefore it should not have been the subject of a forfeiture proceeding. Following the denial of his motion for return of property in October 1998, Pena states that he informed the Commissioners of Lehigh County "of the unconstitutional policy being implemented by the District Attorney's Office." (Pl.'s Obj. Mot. for S.J.). The "policy" referred to appears to be the method used to notify Pena of the forfeiture proceedings, and he alleges that in failing to respond to his allegations the

Commissioners were "deliberately indifferent to [his] constitutional rights." Id. Further, Pena alleges that defendants "'consciously' failed to train their officers to comply with. . . procedure[s]. . . for processing forfeiture; even after being put on notice of employees [sic] policy that is contrary to clearly established law." Id.

Reading plaintiff's complaint and response to defendants' motion for summary judgment liberally, Pena contends that since he notified the Commissioners of Lehigh County that he had never received notice of the forfeiture proceeding, their knowing failure to respond constitutes a deliberate indifference to the alleged violation of his constitutional rights. Pena offers no evidence, and indeed makes no allegation, that an unconstitutional decision, custom or practice was implemented at the policy making level, but rather alleges that lower level employees engaged in unconstitutional behavior of which policymakers should have been aware. Without addressing whether or not this is sufficient to proceed against defendants under section 1983, as I have determined that defendants' attempts to notify plaintiff of the forfeiture proceeding complied with section 6802, and that the procedures outlined in that section satisfy the requirements of due process under the Fourteenth Amendment, I find that no reasonable juror could conclude that defendants were either deliberately indifferent to plaintiff's constitutional rights or failed to train their officers or employees so as to create an actionable violation of those rights.

2. Obstruction of Appellate Procedure

Plaintiff also alleges that defendants refused to supply him with copies of any notice,

order or transcripts of the 1994 forfeiture proceeding. Pena contends this refusal was "a deliberate act of obstructing appellate review of [d]efendant's denial of [p]laintiff's Motion for Return of Property," and constitutes a "deliberate indifference to statutory procedures." (Pl.'s Comp.) Following the denial of plaintiff's motion for return of property in January 1999 plaintiff filed a petition with the county court for an order of transcripts and records related to the 1994 forfeiture proceeding. Defendants filed a response opposing this request. On May 6, 1999 the Lehigh County Court of Common Pleas ruled in favor of defendants and denied Pena's petition. On April 11, 2000 the Commonwealth Court of Pennsylvania affirmed this order. Plaintiff's failure to obtain materials relating to the forfeiture procedure is not then the result of "deliberate indifference" on the part of defendants but is rather the result of a court order. Such a judicial determination offers no issue of material fact relating to plaintiff's claim of a constitutional violation on the part of defendants.

Accepting all factual allegations in the light most favorable to the plaintiff there are no issues of material fact that might enable a reasonable juror to find in favor of the plaintiff. Defendants are accordingly entitled to judgment as a matter of law and their motion for summary judgment will be granted. In light of this determination plaintiff's request for further discovery will be denied.

An appropriate Order follows.

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ORDER

AND NOW, this day of January, 2001, in consideration of defendants' motion for summary judgment, plaintiff's response thereto, and the reasons set forth in the accompanying memorandum it is ORDERED:

1. Defendants' motion for summary judgment is GRANTED.

2. Plaintiff's motion to compel discovery is DENIED as moot.

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THOMAS N. O'NEILL, JR., J.